

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-207350

DATE: November 17, 1982

MATTER OF: Southland Associates

## DIGEST:

1. Solicitation for lease of office space stating that preference will be given to space in historic buildings is deficient when it does not indicate how preference will be applied. However, protester cannot reasonably assume that preference is absolute and that an offer of historic space will be accepted over offer of non-historic space, regardless of price.
2. When applicable statute states that GSA should acquire space in historic buildings when "feasible and prudent" compared with available alternatives, agency has not abused its discretion or violated statute in making award to firm offering non-historic space at substantially lower price.
3. When offeror is orally informed of an agency's requirement during negotiation, notwithstanding its absence in solicitation, offeror is on notice of the requirement, and GAO will deny protest based on failure to state it in the solicitation.
4. Inspection of offered space and/or request for alternate offer does not constitute an acceptance or implied lease by the Government. Acceptance of an offer must be clear and unconditioned.

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Southland Associates protests an award to First Federal Savings and Loan Association of Durham, North Carolina, for lease of office space to be occupied by the Internal Revenue Service. Southland alleges that the General Services Administration failed to give a required preference to its proposed site, which was listed in the National Register of Historic Places. We dismiss the protest in part and deny the remainder.

The GSA issued the solicitation, No. RNC81067, on August 14, 1981, requesting a minimum of 4,400 and a maximum of 4,532 square feet of modern, air conditioned office space and one outside parking space in the central business district of Durham. On December 4, GSA amended the solicitation to state that "preference will be given to offers of space in buildings listed in the National Register of Historic Places \* \* \*." Southland submitted an offer of \$7.45 per square foot per year for space on the basement level of the Kress Building, a Durham landmark listed in the National Register.

After inspecting the space, the IRS, which at that time was housed in the First Federal Building, advised GSA that it objected to moving to the Kress Building due to high relocation costs and access problems the space would cause for the physically handicapped. In addition, the IRS objected to the basement location because of the lack of windows, which it argued would adversely affect morale and worker productivity. The IRS stated that if GSA insisted on relocating it, above-grade space in the Kress Building with adequate access should be considered. GSA concluded the basement space did not meet the minimum needs of the Government.

Southland was orally advised of GSA's determination and was requested to submit an offer for above-grade space. On March 12, 1982, Southland submitted an alternative offer of \$9.70 per square foot for second floor space in the Kress Building. First Federal, however, offered a succeeding lease of \$8.14 per square foot, with one parking space at \$150, for an effective rate of \$8.17 per square foot per year. The contracting officer consequently sought and obtained permission to waive the historic building preference, since the Government would save \$23,728 over five years by entering into a succeeding lease with First Federal.

Grounds of Protest:

Southland alleges that GSA failed to apply the stated preference for space in an historic building and that such action was an abuse of GSA's discretion, violating applicable law and regulations. Southland also argues the solicitation did not clearly state that basement space would not meet the Government's requirements. Finally, Southland argues that the basement space offered was fully accessible, that windows are not vital to the mission of IRS, and that its offer of basement space at \$7.45 a square foot was the most advantageous to the Government.

GSA's Leasing Policies:

The contracting officer's determination to continue to lease space in the First Federal Building was based on an internal memorandum in which GSA's Public Buildings Service attempted to reconcile seemingly inconsistent policies favoring (1) historic buildings and (2) succeeding leases. Section 102(a) of the Public Buildings Cooperative Use Act of 1976, 40 U.S.C. § 601a (1976), provides that GSA shall acquire and utilize space in buildings of historic significance unless use of such space would not prove "feasible and prudent" compared with available alternatives. The GSA handbook, "Requisition of Leasehold Interest in Real Property," June 22, 1981, also requires an historic site preference unless leasing space in such a building represents poor business judgment. However, GSA's policy on succeeding leases, established by memorandum of February 9, 1981, favors retaining agencies' locations when leases expire if their needs have not changed and if the rental rate is competitive with the local market.

Considering these two policies, the Commissioner of the Public Buildings Service, by memorandum of February 1, 1982, directed that a succeeding lease should be preferred over an historic site offer unless acceptable space could be obtained in an historic building at a price more advantageous than that of an existing lessor. Relying on this memorandum, the contracting officer rejected Southland's offer for second floor space, even though the Kress Building was an historic site.

GAO Analysis:

We believe GSA's amended solicitation was deficient in that it did not state how the historic building preference would be applied. We do not, however, believe that it was reasonable for Southland to assume that this was an absolute preference, and that an offer of space in the Kress Building would be accepted over any offer of space in a non-historic building, regardless of price. To the extent that it did so, it risked rejection of its offer.

The statute on which the preference is based requires acquisition of space in historic buildings to be feasible and prudent, compared with available alternatives. In view of the fact that Southland's offer of second floor space was \$1.53 a square foot higher than that of First Federal--without considering relocation costs--we do not find that GSA abused its discretion or violated the statute in determining that it was neither feasible nor prudent to accept the offer of space in the Kress Building.

For the future, however, we are recommending that GSA clearly indicate in its solicitations how the historic building preference will be applied, specifically referencing the Public Buildings Service memorandum interpreting the Cooperative Use Act to mean that space in an historic building should not be acquired when its price is greater than that of non-historic space. In addition, if relocation costs are to be considered in comparing an historic building with a succeeding lease, GSA should include an evaluation factor for these costs in its solicitations.

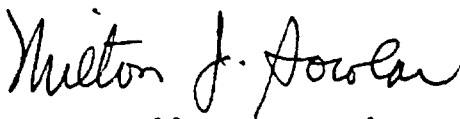
GSA concedes that the protested solicitation did not clearly state that basement space would not meet the Government's needs, and agrees that this requirement should have been reflected in an amendment. However, we consistently have held that when an offeror is informed of an agency's requirement during negotiations, notwithstanding its absence in a solicitation, the offeror is on notice of the requirement. Washington School of Psychiatry, B-192756, March 14, 1979, 79-1 CPD 163; ADP Network Services, Inc., B-193817, March 7, 1979, 79-1 CPD 163. Southland was in fact informed of IRS's need for above-grade space during the negotiation period and was allowed to submit an alternative offer. We therefore cannot find the award improper on this basis.

Southland states that because GSA and IRS inspected the proposed site, and because it was requested to submit prices for space on the second floor of the Kress Building, it understood that its offer would be accepted by GSA and acted to its detriment upon this understanding. GSA's actions, however, did not constitute an acceptance or create an implied contract between Southland and GSA. The acceptance of a contractor's offer by the Government must be clear and unconditioned. Laurence Hall d/b/a Halcyon Days, B-189697, February 1, 1978, 78-1 CPD 91.

Southland further argues that its offer of \$7.45 a square foot for space in the basement of the Kress Building should have been accepted because it was the lowest submitted by a responsible offeror. However, since this was an offer to provide something other than what the Government required, the fact that Southland's price was lower than First Federal's is irrelevant. See Q.S. Incorporated, B-203503, May 4, 1982, 82-1 CPD 417.

Finally, Southland's challenge to IRS's requirements for windows and handicapped access is, in our opinion, untimely. We consider GSA's oral advice to Southland that the basement space was unacceptable to be the equivalent of an amendment to the solicitation. Our Bid Protest Procedures, 4 C.F.R. § 21.2(b) (1) (1982), require protests regarding amendments to be filed before the next closing date for receipt of proposals. By analogy, Southland's protest should have been filed not later than the due date for its offer of second floor space. Since Southland did not challenge the requirements by that time, we dismiss this basis of protest.

The remainder of the protest is denied.

for   
Comptroller General  
of the United States